



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF M-S-S-, INC.

DATE: JAN. 23, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software consulting services, seeks to employ the Beneficiary as a software developer. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a position requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the record did not establish the offered position's need for an advanced degree professional.

On appeal, the Petitioner argues that its use of required language on the accompanying certification from the U.S. Department of Labor (DOL) did not reduce the job's minimum requirements to less than an advanced degree.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker usually follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). See section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a petitioner demonstrates that it can pay a position's DOL-certified, proffered wage. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

II. THE JOB'S QUALIFICATIONS FOR THE REQUESTED CLASSIFICATION

When accompanying a petition for an advanced degree professional, a labor certification "must demonstrate that the job requires a professional holding an advanced degree." 8 C.F.R. § 204.5(k)(4)(i). The term "advanced degree" means:

any United States professional or academic degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

Here, the labor certification states the primary requirements of the offered position of software developer as a U.S. master's degree or a foreign equivalent degree, and three years of experience. The labor certification also states the Petitioner's alternate acceptance of a bachelor's degree and five years of experience. Thus, by requiring at least a master's degree or a bachelor's degree followed by five years of experience, these portions of the labor certification indicate the position's need for an advanced degree professional.

The Director, however, noted that part H.14 of the labor certification lists additional job requirements. Part H.14 states that the Petitioner "[w]ill also accept an equally suitable combination of education, training and/or experience which would qualify an applicant to perform the duties of the job offered." The Director found this statement to indicate the Petitioner's acceptance of less than an advanced degree for the offered position. The Director therefore concluded that the job does not require an advanced degree professional.

As the Petitioner argues, however, the DOL requires such statements on certain labor certification applications. Where, as here, a petitioner already employs a beneficiary who potentially qualifies for the offered position based solely on its alternate requirements, an application must state that "any suitable combination of education, training, or experience is acceptable." 20 C.F.R. § 656.17(h)(ii). The requirement stems from a decision of the Board of Alien Labor Certification Appeals (BALCA). See *Matter of Kellogg*, 94-INA-465 (BALCA Feb. 2, 1998) (*en banc*). Referring to the case's name, many call the required statement "*Kellogg* language."

We do not consider *Kellogg* language - when used on labor certifications pursuant to DOL regulation - to alter minimum job requirements of offered positions. Other language in part H.14, however, *does* indicate the job's unsuitability for the requested classification. Part H.14 also states that the position primarily requires education of a "Master's [degree] . . . or its foreign educational equivalent or its equivalent in education and experience." (emphasis added). Thus, the Petitioner appears to accept master's equivalencies that include combinations of educational credentials, and educational credentials and experience. Such combinations do not reflect a need for an advanced

degree professional. As previously indicated, an “advanced degree” means “a United States . . . degree or a foreign equivalent degree above that of baccalaureate.” 8 C.F.R. § 204.5(k)(2) (emphases added). If followed by five years of qualifying experience, a “United States baccalaureate degree or a foreign equivalent degree” also equates to a master’s degree. *Id.* (emphases added). Thus, to qualify for advanced degree professional classification, a job must require a single master’s or bachelor’s degree, rather than degree equivalencies based on combinations of educational credentials, or educational credentials and experience. Contrary to the regulatory definition of the term “advanced degree,” part H.14 of the labor certification appears to indicate the Petitioner’s acceptance of master’s equivalencies beyond single degrees, or single degrees equating to U.S. bachelor’s degrees followed by at least five years of experience.

The Petitioner did not receive notice of this specific deficiency or an opportunity to resolve it. We will therefore remand the matter. On remand, the Director should provide the Petitioner with notice of the deficiency and a reasonable opportunity to resolve it.

III. THE EXPERIENCE REQUIRED FOR THE OFFERED POSITION

Although unaddressed by the Director, the record also does not establish that the Beneficiary gained the minimum experience required for the offered position. A petitioner must demonstrate a beneficiary’s possession of all DOL-certified job requirements by a petition’s priority date. *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 160 (Acting Reg’l Comm’r 1977). This petition’s priority date is March 28, 2016, the date the DOL accepted the accompanying labor certification application for processing. See 8 C.F.R. § 204.5(d) (explaining how to determine a petition’s priority date).

Here, the labor certification details the primary requirements of the offered position of software developer as a master’s degree and three years of experience in the job offered or as a software engineer, Java programmer, or technical lead. As previously indicated, the Petitioner also stated its acceptance of a bachelor’s degree and five years of post-degree experience. In addition, part H.14 specifies that “[t]he required experience must include 36 months using Java and J2EE.”

On the labor certification, the Beneficiary attested that, by the petition’s priority date, he earned a bachelor’s degree and gained more than five years of full-time, post-baccalaureate experience in India. He stated that he worked as a technical lead for an information technology company, from the issuance of his bachelor’s degree in February 2010 through October 2015.

Pursuant to 8 C.F.R. § 204.5(g)(1), the Petitioner provided a copy of a letter from the Beneficiary’s former employer to support the purported experience. The letter confirms the Beneficiary’s claimed dates of employment and full-time status. The letter, however, states his position as technical lead “at the time of leaving.” The letter does not indicate whether he worked in other positions for the employer and, if so, whether they constituted acceptable, related occupations. The letter also states the Beneficiary’s duties and experience with Java and J2EE “during the stay with the organization.” But the letter does not specify whether the Beneficiary used Java and J2EE for at least three years as

the labor certification requires. Thus, the record does not establish the Beneficiary's possession of the minimum experience required for the offered position.

On remand, the Director should notify the Petitioner of these deficiencies and afford it a reasonable period to resolve them. Additional evidence must demonstrate that, between February 2010 and March 2016, the Beneficiary worked at least five years in the job offered or as a technical lead, software engineer, or Java programmer, and used Java and J2EE for at least three of those years.

IV. ABILITY TO PAY THE PROFFERED WAGE

Also unaddressed by the Director, the record does not establish the Petitioner's ability to pay the position's proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of software developer as \$104,666 a year. As previously indicated, the petition's priority date is March 28, 2016.

The Petitioner submitted a copy of its federal income tax return for its fiscal year beginning July 1, 2015. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the Petitioner's continuing ability to pay in 2016-17 or 2017-18. Also, USCIS records indicate the Petitioner's filing of petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its continuing ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date of March 28, 2016, or filed thereafter.¹ See *Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of its grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).

On remand, the Director should allow the Petitioner an opportunity to resolve the deficiencies discussed above. The Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements for 2016-17 and, if available, 2017-18. The Petitioner must also provide the receipt numbers, proffered wages, and priority dates of its other petitions that were pending or approved as of March 28, 2016, or filed thereafter. The Petitioner may also submit evidence of wages it paid to applicable beneficiaries after that date, or of their approvals for permanent residence. Further, the Petitioner may submit additional evidence of its ability to pay, including

¹ The Petitioner need not demonstrate its ability to pay the proffered wages of petitions that were withdrawn, or were denied or revoked without current pending appeal. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions, or after associated beneficiaries obtained lawful permanent residence.

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materials supporting the factors stated in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

V. CONCLUSION

For reasons discussed above, the record does not demonstrate that the offered position requires an advanced degree. The Petitioner also has not demonstrated its ability to pay the position's proffered wage or the Beneficiary's possession of the minimum experience required for the job.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of M-S-S-, Inc.*, ID# 2481611 (AAO Jan. 23, 2019)